

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

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IN THE MATTER OF APPLICATION)	
FOR BENEFICIAL WATER USE)	
PERMIT NO.76L-30024588 BY DAVID &)	FINAL ORDER
ANNA BAILEY)	

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Pursuant to its authority under Montana Code Annotated §§ 2-4-601 *et seq.*, and 85-2-310, and Mont. Admin. R. 36.12.201 *et. seq.* and 36.12.501 *et seq.*, and upon the request of Applicant David M and Anna M Bailey, the Department of Natural Resources and Conservation (Department) conducted a show cause hearing in this matter on September 3, 2008, to allow Mr. and Mrs. Bailey, hereinafter referred to as "Applicant" for the above application, to show cause why the Application For Beneficial Water Use Permit should not be denied under the terms specified in the Statement of Opinion issued by the Department on June 19, 2008 (attached). The show cause hearing provided the Applicant an opportunity to present additional written or oral evidence and argument. This Final Order must be read in conjunction with the June 19, 2008 Statement of Opinion.

APPEARANCES

Applicant David and Ann Bailey appeared and represented themselves at the hearing.

EXHIBITS

Applicant offered no exhibits for the record.

PRELIMINARY MATTERS

Applicant requested a show cause hearing on July 17, 2008, and a show cause hearing was held on September 3, 2008.

All of the testimony offered by the Applicant was accepted into the record. This Final Order must be read in conjunction with the June 19, 2008 Statement of Opinion,

because the show cause hearing was held to address the denial of the Application for the reasons set forth in the Statement of Opinion. This decision considers the new evidence and arguments information presented by Applicant at the hearing and constitutes the Final Order on this Application. The Application was proposed to be denied, because the applicant failed to prove the criteria of Legal Availability and Adverse Effect, 85-2-311 (a)(ii)(b). Criteria related to Physical Availability, Adequacy of Diversion, Beneficial Use, Possessory Interest and Water Quality were addressed in the Statement of Opinion and were proven and were not part of this hearing, 85-2-311(c)(d)(e) and (f).

The Hearing examiner, having reviewed the full record in this matter and being fully advised in the premises, does hereby respond as follows to the Applicant's arguments presented at the Show Cause Hearing held September 3, 2008.

1. **Applicant Argument:** Mr. Bailey explained that he believes that it is unknown whether the Bitterroot is over-appropriated; and that his permit should not be denied on that basis. He questioned whether adjudication of this basin would result in more accurate figures of quantity of water available. He believes the State is responsible to quantify the water already appropriated, and the amount left available for appropriation. He questioned how his claim could be denied until the adjudication is completed.

Hearing Examiner Response: This issue was previously raised by the Applicant and decided in the June 19, 2008, Statement of Opinion. Included in the application and the Statement of Opinion is as a review of the existing 103 water rights on Little Bitterroot Lake. Ninety-nine of the water rights out of the 103 have a combined volume of 186.02 acre-feet. The remaining four water rights are large irrigation water rights. Two each are owned by the Flathead Joint Board of Control and the U.S. Department of Interior. The annual volume claimed by each of these four water rights amounts to 4,237,200 acre-feet, over eight times the total volume of the entire lake and around 329.7 acre-feet of water per acre of irrigation. The claim examination for this basin is scheduled to begin in 2010. The Department cannot change or limit a

water right; that is the sole province of the Water Court. MCA 85-2-212 thru 85-2-283. No matter when or how water rights are adjudicated, the Applicant would still have to prove the criteria of MCA 85-2-311 and show what the actual use is compared to what is adjudicated and that there is legally enough water for Applicant's use and that Applicant's use will not cause adverse effect. Here, Applicant in support of its argument did not provide evidence of actual use of the water right claims for Little Bitterroot Lake. Applicant did not show cause why on this issue its permit should not be denied.

2. **Applicant Argument:** Applicants expressed frustration that the time period between their application submittal and denial was two years. This, they felt, was an undo hardship. They felt entitled to an earlier decision. They felt that the time delay resulted in costs to them of over \$2,000.00.

Hearings Examiner Response: The application was received in October of 2006. The application was determined to be adequate to proceed in further processing in December of 2006. It was then sent to the Applicant's consultant Aquatek Consulting for Public Notice in December of 2006. It was published January 2, 2007 with objection deadline February 2, 2007. The applicant sent the Public Notice Packet to the Regional Office in March 2007. In the meantime the Kalispell Regional Office completed the environmental assessment in May of 2007 the Applicant was sent a copy of a deficiency letter with an Application Review Form attached that addressed the issues associated with the application. In June of 2007 Regional Office received a response to the deficiency letter which contained material to proceed in the application review. At that point no further action was taken due to the perceived impact to senior hydropower water rights. In early June of 2008, the Department determined small water right applications may proceed in review. This application was immediately put back into the analysis process. During the final review process there was a finding that other issues related to senior water rights that would be impacted. The analysis resulted in a Statement of Opinion to be issued in June of 2008. Even though it seems untimely to the Applicant, the process takes some time. The Applicant's consultant did not provide additional information to negate the contention of adverse effect to senior water rights and therefore, did not

meet legal availability and adverse effect criteria as outlined in 85-2-311 (a)(ii)(b). There is no provision in law for providing the Applicant with money when they feel the process has taken too long and none will be ordered.

3. **Applicant Argument:** Mr. Bailey stated that his consultant, Mark Paulson of Aquatek Consulting, did not receive from the Department a copy of the Notice of Hearing or the Statement of Opinion. Applicants felt that the DNRC was in error by not sending copies of these items to their consultant. They pointed out the section on the signature page of their permit application where the applicant contact information was completed with the consultant's information.

Hearings Examiner Response: The hearings examiner stated at the show cause hearing that the consultant is an employee of the Applicant and it is the responsibility of the Applicant to hire, inform and direct the activities of the consultant. In the application it does discuss making contact with the consultant for all correspondence. The Department rule on contacts reads:

36.12.122 CONTACTS

- (1) If communication about a water right application filing or objection filing is to be conducted through an individual other than the applicant, the name address, and phone numbers must be supplied.
- (2) If a contact person is identified as legal counsel, all communication will be sent only to the attorney unless the attorney provides written instruction to the contrary.
- (3) If a contact person is identified as a consultant, employee, or lessee, the individual filing the water right form or objection form will receive all correspondence and a copy will be sent to the contact person.
- (4) A contact cannot represent an applicant at a hearing unless the contact is an attorney.

Even if a notice of the show cause hearing was not sent to the Applicant's consultant, no harm has occurred to the Applicant. In this case the Applicant received notice of the show cause hearing and could have contacted their

consultant. The consultant was not the Applicant's legal representative and could not have represented the Applicant at the show cause hearing. Additionally, no request for any kind of continuance to prepare for the show cause hearing was made in this case by the Applicant. The Applicant has not been harmed by the way the show cause notice was sent out in this case.

4. **Applicant Argument:** Mr. Bailey pointed out that the Statement of Opinion contained a reference to overruling the Distefano decision, and if that could be overruled the applicant questioned why the Department can not overrule the 10,000 cfs claims of senior water rights. He said further that his usage is for a small use like Distefano.

Hearings Examiner Response: In its Statement of Opinion the Department explained why it was overruling its prior decision in *In the Matter of the Application for Beneficial Water Use Permit 82374-76L by Frank and Patricia Distefano* (1993). The Department overruled that decision and all other decisions relying on the argument that dead storage in a reservoir is generally legally available when the active storage is not. While the Department has the power to overrule its prior decisions, and needs to explain why a prior decision was overruled, the Department has no authority, as Applicant asks, to "overrule" the water rights or claims of other water users. Only the Water Court has the jurisdiction to adjudicate water rights. Hidden Hollow Ranch v. Fields 321 Mont. 505, 513, 92 P.3d 1185, 1191 (Mont.,2004); Mildenberger v. Galbraith, 249 Mont. 161, 166, 815 P.2d 130, 134 (1991); State ex rel. Jones v. District Court, 1283 Mont. 1, 7, 938 P.2d 1312, 1316 (1997). In this case it is the burden of the Applicant to prove the criteria of MCA § 85-2-311. No matter how a prior water right is adjudicated, whether 10,000 cfs or 1 cfs, it is still the burden of the applicant to make its proof of legal water availability and lack of adverse effect, and an Applicant can put on proof of what the actual water use is and argue that there is still sufficient use of water for Applicant's proposed use without adversely affecting senior water rights. Here, Applicant provided no such proof of actual use. Finally, as stated in the Statement of Opinion, the water rights must be addressed on a case by case basis, regardless of the size of the proposed appropriation.

Based upon the discussion found in the State of Opinion the overruled *Distefano* decision and because no new evidence was submitted during the hearing, the Applicant did not show cause why its permit should not be denied.

5. **Applicant Argument:** In discussion regarding water quantity, Mr. Bailey claimed that the Little Bitterroot Lake cannot possibly have a prior appropriation of 10,000 cfs, claiming this is an excessive figure. He stated further that the DNRC does not show that dead storage in the lake is not increased when surface hydraulic pressure is reduced and that when water pressure from a full lake is reduced it creates less hydraulic pressure on the lake primarily filled by sub-surface springs.

Hearings Examiner Response: The argument that Little Bitterroot Lake cannot have a prior appropriation of 10,000 cfs was discussed in Argument #1 and the response in the Statement of Opinion. Recognizing there may be an issue with excessive appropriation there still remains the fact that the basin must be adjudicated to determine claim accuracy and even after, the Applicant has to prove there is room for their proposed appropriation in light of the actual use. Relating to hydraulic pressure, the theory is valid however there are numerous factors to be considered one of which is that it is highly improbable that there would be equal replacement for the same amount removed. There maybe some water replacement in the lake but only a small amount and surely not to the extent requested to keep the lake at equilibrium. Consideration must be given to permeability of the lake bottom, ground water spring characteristics, ground water that may influence other areas, the amount of spring flow and pressures related to least resistance, lower ground water table affects, and the amount of water being requested elsewhere resulting in less ground water pressure to fill the hydraulic pressure of the lake. The Department Hydrologist concurred that the theory is correct but, there are a number of variables that must be considered and that only a small percentage will be replaced by ground water due to hydraulic pressure. Applicant did not submit data to support his claim and the burden is on the Applicant to provided such evidence, not the Department. MCA 85-2-311. The Applicant did not show cause why its permit should not be denied.

6. **Applicant Argument:** Mrs. Bailey stated that the Bitterroot Homeowners Association had hired a hydrologist over the past 7-10 years to conduct analysis on water quality, including some work relating to the watershed.

Hearings Examiner Response: The Applicant did not submit data of this analysis. This information was also not submitted in the application process. There may have been information that would have assisted in evaluating the water availability which was not in contention but would not have resolved the issue of over appropriation, Legal Availability, and Adverse Effect. MCA 85-2-311(a)(ii)(b).

WHEREFORE, based upon the foregoing, Hearing Examiner makes the following:

FINAL ORDER

I FIND THE Applicant did not provide additional written or oral evidence and argument to show why the Application for Beneficial Water User Permit should not be denied as stated in the Statement of Opinion issued by the Department on June 19, 2008.

Therefore, Application for Beneficial Water Use Permit No. 76L-30024588 by David and Anna Bailey is **DENIED** for the reasons specified above and in the Statement of Opinion.

NOTICE

A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision is entitled to judicial review under the Montana Administrative Procedure Act (Title 2, Chapter 4, MCA). A petition for judicial review under this chapter must be filed in the appropriate district court within 30 days after service of the final order. (MCA § 2-4-702)

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for

certification to the reviewing district court, the requesting party must make arrangements for preparation of the written transcript. If no request for a written transcript is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 12th day of September, 2008.

/Original signed by Terry Eccles by e-signature/

Terry Eccles
Hearings Officer
Water Resources Division
Department of Natural Resources
and Conservation
109 Cooperative Way, Suite 110
Kalispell, MT 59901

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the **FINAL ORDER** was served upon all parties listed below on this 12th day of September, 2008, by first-class United States mail.

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/Original signed by Jamie Price/
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